A **DATO' SERI ANWAR IBRAHIM**

v.

PP

B FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
AHMAD MAAROP FCJ
HASAN LAH FCJ
C ABU SAMAH NORDIN FCJ
[CRIMINAL APPEAL NO: 05-229-10-2013(W)]
21 NOVEMBER 2013
[2014] CLJ JT(2)

D ***CRIMINAL PROCEDURE:*** *Public Prosecutor - Powers and functions - Power to appoint Deputy Public Prosecutor - Whether could appoint advocate as Deputy Public Prosecutor - Federal Constitution, art. 145(3) - Criminal Procedure Code, ss. 376(3), 378 & 379*

E ***CRIMINAL PROCEDURE:*** *Prosecution - Appeal - Conduct of - Prosecution of appeal conducted by advocate appointed as Deputy Public Prosecutor by Public Prosecutor - Whether legally proper - Whether appointment valid - Whether Public Prosecutor empowered to make appointment - Whether appointment vitiated by conflict of interest - Criminal Procedure Code, ss. 376(3), 378 & 379 - Legal Profession (Practice & Etiquette) Rules 1978, r. 5(a)*

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LEGAL PROFESSION: *Advocates - Appointment as Deputy Public Prosecutor - Advocate appointed by Public Prosecutor as Deputy Public Prosecutor to prosecute appeal before Court of Appeal - Whether* G *appointment valid - Whether vitiated by conflict of interest - Criminal Procedure Code, ss. 376(3), 378 & 379 - Legal Profession (Practice & Etiquette) Rules 1978, r. 5(a)*

The appellant in this case was acquitted and discharged by the H High Court of an offence under s. 377C of the Penal Code. The Public Prosecutor ('PP') appealed and, for the purpose of the appeal, appointed an advocate ('Tan Sri Shafee') as a Deputy Public Prosecutor ('DPP') to represent him and prosecute the appeal before the Court of Appeal. The appellant averred that I Tan Sri Shafee's appointment was null and void, and in transgression of s. 378 of the Criminal Procedure Code ('CPC'), and in the circumstances applied to disqualify him from representing the PP in the appeal. The application was however

dismissed by the Court of Appeal on the ground that Tan Sri Shafee's appointment, made as it were under s. 376(3) of the CPC, was *intra vires* the law and the Federal Constitution. It was the further view of the Court of Appeal that, notwithstanding that Tan Sri Shafee had given his s. 112-CPC statements to the police in respect of the appellant's trial, Tan Sri Shafee was not a material witness to both the prosecution and the defence. More specifically, it was held that Tan Sri Shafee was not a material witness to unfold the narratives of the prosecution's case and that his appointment was not and never vitiated by any conflict of interest. The appellant appealed to the Federal Court and the primary issue that arose was whether Tan Sri Shafee's appointment as a DPP herein, in the light of the relevant statutory provisions, was valid and lawful or was impaired by conflict of interest.

Held (dismissing appeal)
Per Raus Sharif PCA delivering the judgment of the court:

(1) The Court of Appeal adopted the right approach in rejecting the appellant's reading of s. 378 of the CPC. Section 378 must not be read in isolation, but must instead be read together with ss. 376(3) and 379. These two latter provisions are complementary of each other, and they clearly give the PP the authority to employ an advocate to conduct the appeal herein. (para 7)

(2) At the trial before the High Court, both the prosecution and the defence did not find Tan Sri Shafee to be a relevant witness. He was not called as a witness. Thus, the issue that he may be a potential witness at the trial that could give rise to a conflict of interest was a non-issue. In any case, on the facts and circumstances of this case, no case had been made out to prevent Tan Sri Shafee from acting as a DPP in the appeal on the ground of conflict of interest. There was no reason to nullify the appointment of Tan Sri Shafee as a DPP to represent the PP in the proceeding. (para 9)

(3) The appellant was challenging the validity of the appointment of Tan Sri Shafee as a DPP, not the existence of that appointment. Since the complaint was not on the appointment *per se* but on its validity, there was no need for Tan Sri Shafee to adduce any evidence on that appointment. There was no necessity for him to depose on affidavit the fact of his appointment as a Deputy Public Prosecutor. (para 16)

A **(4)** The reference by the Court of Appeal to Tan Sri Shafee's statements under s. 112 of the CPC, which had been struck out, had no effect on our decision on the issue of conflict of interest on the part of Tan Sri Shafee. On the facts and circumstances of this case, no case had been made on the
B issue of conflict of interest. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dalam kes ini telah dilepas dan dibebaskan oleh Mahkamah Tinggi, Kuala Lumpur atas kesalahan di bawah s. 377C Kanun
C Keseksaan. Pendakwa Raya ('PR') merayu dan, bagi maksud rayuan, telah melantik seorang peguambela ('Tan Sri Shafee') sebagai seorang Timbalan Pendakwa Raya ('TPR') untuk mengendalikan rayuan di hadapan Mahkamah Rayuan. Perayu
D mengatakan bahawa perlantikan Tan Sri Shafee adalah tak sah, dan melanggari peruntukan s. 378 Kanun Tatacara Jenayah ('KTJ'), dan dengan demikian memohon untuk menghalang Tan Sri Shafee dari mewakili PR di dalam rayuan. Permohonan bagaimana pun ditolak oleh Mahkamah Rayuan atas alasan bahawa perlantikan
E Tan Sri Shafee, yang dibuat di bawah s. 376(3) KTJ, adalah teratur dan sah di sisi undang-undang dan Perlembagaan. Seterusnya, menjadi pandangan hakim-hakim rayuan bahawa walaupun Tan Sri Shafee ada memberikan kenyataan kepada polis di bawah s. 112 KTJ berkaitan perbicaraan perayu, beliau bukan
F merupakan seorang saksi penting kepada kedua-dua pihak pendakwaan dan pembelaan. Secara lebih spesifik, ianya diputuskan juga bahawa Tan Sri Shafee bukanlah seorang saksi penting bagi merungkai kes pendakwaan dan bahawa perlantikan beliau adalah tidak dicemari oleh apa-apa konflik kepentingan. Perayu merayu ke
G Mahkamah Persekutuan dan persoalan penting yang berbangkit adalah sama ada, mengambilkira peruntukan-peruntukan statut yang relevan, perlantikan Tan Sri Shafee sebagai TPR di sini adalah teratur dan sah, atau dikotori oleh konflik kepentingan.

Diputuskan (menolak rayuan)
H **Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:**

(1) Mahkamah Rayuan telah mengambil pendekatan yang betul apabila menolak pentafsiran s. 378 KTJ oleh perayu. Seksyen 378 tidak harus dibaca secara berasingan, tetapi sebaliknya
I hendaklah dibaca bersama-sama dengan ss. 376(3) dan 379. Dua peruntukan yang terkemudian adalah saling cukup

mencukupi antara satu sama lain, dan keduanya jelas memberikan PR kuasa untuk melantik seorang peguambela bagi mengendalikan rayuan berkaitan.

(2) Di perbicaraan di hadapan Mahkamah Tinggi, kedua-dua pendakwaan dan pembelaan tidak mendapati Tan Sri Shafee sebagai seorang saksi yang relevan. Beliau tidak dipanggil sebagai saksi. Oleh itu, isu bahawa beliau mungkin merupakan seorang saksi berpotensi di perbicaraan yang akan membangkitkan konflik kepentingan adalah suatu non-issue. Apapun, berdasarkan fakta dan halkeadaan kes, tiada kes telah dibuktikan yang boleh menghalang Tan Sri Shafee dari bertindak sebagai seorang TPR di rayuan atas alasan konflik kepentingan. Tiada apa-apa alasan untuk membatalkan perlantikan Tan Sri Shafee sebagai TPR bagi mewakili PR dalam prosiding ini.

(3) Perayu telah mencabar kesahan perlantikan Tan Sri Shafee sebagai seorang TPR, bukannya kewujudan perlantikan tersebut. Oleh kerana rungutan bukan berkaitan perlantikan *per se* tetapi tentang kesahannya, maka tidak ada keperluan untuk Tan Sri Shafee mengemukakan apa-apa keterangan berhubung perlantikan itu. Tiada keperluan untuk Tan Sri Shafee mengikrarkan fakta perlantikannya sebagai seorang TPR melalui afidavit.

(4) Rujukan yang dibuat oleh Mahkamah Rayuan kepada kenyataan s. 112, yang telah pun dibatalkan, tidak mempunyai sebarang kesan terhadap keputusan kami atas isu konflik kepentingan di pihak Tan Sri Shafee. Di atas fakta dan halkeadaan kes ini, tiada kes dibuktikan berkaitan isu konflik kepentingan.

Legislation referred to:
Criminal Procedure Code, ss. 112, 376(3), 378, 379
Legal Profession (Practice and Etiquette) Rules 1978, r. 5(a)
Penal Code, s. 377C

For the appellant - Karpal Singh (Sangeet Kaur Deo with him); M/s Karpal Singh & Co
For the prosecution - Muhammad Shafee Abdullah (Mohamad Hanafiah Zakaria & Noorin Badaruddin with him); DPPs

[Editor's note: For the Court of Appeal judgment, please see PP v. Dato' Seri Anwar Ibrahim [2014] 1 CLJ 354.]

Reported by Wan Sharif Ahmad

A

JUDGMENT

Raus Sharif PCA:

[1] This is an appeal by Dato' Seri Anwar bin Ibrahim ("DSAI") against the decision of the Court of Appeal in dismissing his application to disqualify Tan Sri Dr Muhammad Shafee bin Abdullah ("Tan Sri Shafee") to act as a Deputy Public Prosecutor before the Court of Appeal in Rayuan Jenayah No. W-05-19-01-2012.

[2] In this case, DSAI was acquitted and discharged by the Kuala Lumpur High Court for an offence under s. 377C of the Penal Code. The Public Prosecutor had lodged an appeal at the Court of Appeal against the said acquittal and discharge. For the purpose of the appeal, Tan Sri Shafee, an advocate was appointed as a Deputy Public Prosecutor by the Public Prosecutor.

[3] Before us, Encik Karpal Singh, learned counsel for DSAI, raised two issues against the decision of the Court of Appeal. Firstly, the Court of Appeal was wrong in concluding that the appointment of Tan Sri Shafee was valid. Secondly, the Court of Appeal was wrong in not concluding that Tan Sri Shafee was a potential witness before the High Court and would place himself in position of conflict and would therefore be in breach of r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

[4] The main contention of Encik Karpal Singh on the first issue was that the appointment of Tan Sri Shafee as the Deputy Public Prosecutor was a nullity and no effect as it is contrary to s. 378 of the Criminal Procedure Code ("CPC") which states:

> **378. No one to appear for Public Prosecutor**
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> No person shall appear on behalf of the Public Prosecutor on any criminal appeal other than the Public Prosecutor, a Senior Deputy Public Prosecutor or a Deputy Public Prosecutor.

[5] It was argued by Encik Karpal Singh that s. 378 of the CPC clearly prohibits any other person not being a Deputy Public Prosecutor from appearing on behalf of the Public Prosecutor in criminal appeals proceedings. In support, Encik Karpal Singh referred to us the repealed provision of s. 378 of the CPC and pointed out that the phrase "or an advocate expressly authorised in writing by the Public Prosecutor or by a Deputy Public Prosecutor acting on behalf of the Public Prosecutor" was

purposely deleted by Parliament from the current provision of s. 378 with the intention of preventing an advocate from appearing on behalf of the Public Prosecutor.

[6] The above argument was rejected by the Court of Appeal. The Court of Appeal was of the view that s. 378 of the CPC must be interpreted in light of other provisions and in particular s. 376(3) and s. 379 of the CPC. For ease of reference we reproduce the two sections:

> **376. Public Prosecutor**
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> (3) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutors as Senior Public Prosecutors.
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> **379. Employment of advocate**
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> With the permission in writing of the Public Prosecutor an advocate may be employed on behalf of the Government to conduct any criminal prosecution or inquiry, or to appear on any criminal appeal or point of law reserved on behalf of the Public Prosecutor. The advocate shall be paid out of the public funds such remuneration as may be sanctioned by the Minister of Finance and while conducting such prosecution or inquiry, or appearing on such criminal appeal or point of law reserved, shall be deemed to be a 'public servant'.

[7] We are in agreement with the approach taken by the Court of Appeal in rejecting Encik Karpal Singh's reading of s. 378 of the CPC. We are of the same view with the Court of Appeal that s. 378 must not be read in isolation. It must be read together with s. 376(3) and s. 379. These two latter provisions are in our view complementary. And the two provisions clearly give the Public Prosecutor the authority to employ an advocate and in this case, Tan Sri Shafee, to conduct the appeal in Rayuan Jenayah No. W-05-19-01-2012. Hence, we see no merit on the first issue raised by Encik Karpal Singh.

[8] On the second issue, it was submitted by Encik Karpal Singh that the Court of Appeal was wrong in not concluding that Tan Sri Shafee was a material witness in the trial of DSAI before

A the High Court and having regard to the conflict of interest was, therefore disqualified from being appointed as a Deputy Public Prosecutor in DSAI's appeal in the Court of Appeal. Encik Karpal Singh submitted that the Court of Appeal was wrong to conclude at para. 35 of the judgment which reads:

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> We agree with the submission of learned DPP that the position of Datuk Seri Shafee to prosecute this appeal is no difference from the role of Encik Karpal Singh as a defence counsel in *PP v. Dato' Seri Anwar Ibrahim & Anor* [2001] 3 MLJ 193. In relation to that case, Encik Karpal Singh disclosed in Dewan Rakyat on
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> C 22 October 1997 that the complainant and one of the witnesses in that case had met him regarding the Applicant over the case. His statement was also recorded by the police. That would have made him a potential witness. He however represented the Applicant as counsel throughout that trial. By comparison in our
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> D view, Encik Karpal Singh's role then is not too dissimilar than the facts referred to in respect of this issue. We say this because despite him being a potential witness Encik Karpal Singh acted as the counsel for the Applicant during the trial. Whereas in the pending appeal the proceeding would proceed without witnesses.

E **[9]** It was argued by Encik Karpal Singh that the above conclusion by the Court of Appeal was a clear misdirection. According to him, in that case no objection was taken by the Public Prosecutor, who conducted the prosecution, unlike in the present case where an objection has been taken specifically

F through a notice of motion. With respect, we are unable to agree with the submission put forward by Encik Karpal Singh. Firstly, it is an undisputed fact that at the trial before the High Court both the prosecution as well as the defence did not find Tan Sri Shafee to be a relevant witness. He was not called as a witness. Thus,

G the issue that he may be a potential witness at the trial that could give rise to a conflict of interest is a non-issue. Secondly, whether a case of conflict of interest in a given case is made out would depend on the facts and circumstances of each case. On the facts and circumstances of this case, we are of the view that no case

H had been made out to prevent Tan Sri Shafee from acting as a Deputy Public Prosecutor in the appeal on the ground of conflict of interest. We see no reason to nullify the appointment of Tan Sri Shafee as the Deputy Public Prosecutor to represent the Public Prosecutor in this proceeding.

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[10] Before concluding, we would like to place on record that Encik Karpal Singh by way of a letter dated 12 November 2013 had raised another issue ie, the effect of striking out of two affidavits deposed by Tan Sri Shafee in encl. 31 and Puan Noorin binti Badaruddin in encl. 32 in reply to the affidavit of DSAI. We also would place on record that we have a written response by Tan Sri Shafee by way of a letter dated 19 November 2013 on the issue raised by Encik Karpal Singh.

[11] It was pointed out by Encik Karpal Singh that with the striking out of the affidavit of Tan Sri Shafee affirmed on 11 September 2013, the letter of appointment of Tan Sri Shafee as a Deputy Public Prosecutor as exhibited in the affidavit was not before the Court of Appeal. Thus, it was submitted that the Court of Appeal was wrong to conclude that:

> There is no doubt that the PP appointed Dato' Seri Shafee under s. 376(3) as clearly stated in the appointment letter of 02.07.2013. The appointment is specifically make for the purpose of the pending appeal in Rayuan Jenayah No. W-05-19-01-2012.

Thus, according to Encik Karpal Singh, without of the affidavit Tan Sri Shafee there is no evidence, documentary or otherwise of the appointment of Tan Sri Shafee as a Deputy Public Prosecutor.

[12] Likewise, according to Encik Karpal Singh, the Court of Appeal was also in error in making reference in the ground of judgment to the statement of Tan Sri Shafee under s. 112 of the CPC which was exhibited as "NB3" in the affidavit of Puan Noorin binti Badaruddin. The Court of Appeal had held:

> Having perused his statement under s. 112, we find that they were recorded in relation to his presence at the house at the time when Mohd Saiful Bukhari met the Prime Minister, Dato' Seri Najib. We do not see how he would be relevant to a sodomy charge against the Applicant. The facts of which in our view is too fleeting to bear any relevance to a sodomy charge. Our view is further fortified by the fact that both the prosecution as well the defence did not find him to be a relevant witness at the trial.

[13] According to Encik Karpal Singh, the above finding by the Court of Appeal was wrong as the affidavit of Puan Noorin binti Badaruddin had been struck out by the Court of Appeal. In short Encik Karpal Singh's complaint is that the Court of Appeal had misdirected itself by taking into account the contents of the affidavit which it itself had been struck out.

[14] With respect, we are of the view that the question whether Tan Sri Shafee had been duly appointed as a Deputy Public Prosecutor was not the issue before the court. In issue before us was the validity of his appointment as a Deputy Public Prosecutor. This can clearly be seen from the notice of motion filed by DSAI as well as in the affidavit in support of the application. In the notice of motion DSAI was seeking for the following prayers:

> (i) Dato' Sri Muhammad Shafee bin Md Abdullah dibatalkan sebagai kaunsel bagi pihak pendakwaan di dalam Mahkamah Rayuan (Bidangkuasa Jenayah) Rayuan Jenayah No. W-05-19-01-2012 ("rayuan tersebut");
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> (ii) Pelantikan Dato' Sri Muhammad Shafee bin Md Abdullah di bawah seksyen 376(3) dan 379 Kanun Acara Jenayah dan Artikel 145(3) Perlembagaan Persekutuan untuk bertindak sebagai kaunsel bagi pihak pendakwaan di dalam rayuan tersebut adalah batal, tidak sah dan tidak berkesan memandangkan Dato' Sri Muhammad Shafee bin Md Abdullah sepatutnya dilantik di bawah seksyen 379 Kanun Acara Jenayah sahaja sebagai seorang peguambela dan memandangkan pemakaian doktrin 'desuetude' kepada seksyen 379 Kanun Acara Jenayah; dan
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> (iii) Apa jua perintah lain yang difikirkan patut dan adil oleh Mahkamah Yang Mulia ini.

[15] Further in the affidavit in support, DSAI clearly states at paras. 5, 6 and 7 the following:

> (5) Saya selanjutnya menyatakan bahawa semasa rayuan tersebut dipanggil untuk perbicaraan pada 22 haribulan Julai 2013, pihak pendakwaan telah pun melantik Dato' Sri Muhammad Shafee bin Md Abdullah sebagai kaunsel bagi pihak pendakwaan di dalam rayuan tersebut dan Dato' Sri Muhammad Shafee bin Md Abdullah tersebut telah pun memaklumkan bahawa pelantikannya tersebut adalah selaras dengan seksyen 376(3) dan 379 Kanun Keseksaan dan Artikel 145(3) Perlembagan Persekutuan dan bahawa beliau juga telah pun di bayar gaji akibat pelantikannya tersebut.
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> (6) Saya adalah dinasihatkan oleh peguamcara saya, nasihat yang mana saya percayai adalah tepat dan benar, bahawa memandangkan pemakaian doktrin 'desuetude' kepada seksyen 379 Kanun Acara Jenayah, pelantikan Dato' Sri Muhammad Shafee bin Md Abdullah tersebut adalah batal, tidak sah dan tidak berkesan.

(7) Saya seterusnya adalah dinasihatkan oleh peguamcara saya, nasihat yang mana saya percayai adalah tepat dan benar, bahawa pelantikan Dato' Sri Muhammad Shafee bin Md Abdullah tersebut di bawah seksyen 376(3) Kanun Acara Jenayah adalah juga batal, tidak sah dan tidak berkesan memandangkan ianya adalah bertentangan dengan seksyen 379 Kanun Acara Jenayah yang mana Dato' Sri Muhammad Shafee bin Md Abdullah tersebut sepatutnya dilantik oleh kerana pembayaran gaji Dato' Sri Muhammad Shafee bin Md Abdullah tersebut oleh pihak kerajaan sebagai seorang peguambela adalah jelasnya bertujuan memampas Dato' Sri Muhammad Shafee bin Md Abdullah tersebut sebagai seorang peguambela dan juga bahawa perkara ini merupakan satu rayuan jenayah yang dirangkumi secara ekspres oleh seksyen 379 Kanun Acara Jenayah tersebut.

[16] From the above, it is clear that DSAI was only challenging the validity of the appointment of Tan Sri Shafee as a Deputy Public Prosecutor, not the existence of that appointment. Since the complaint is not on the appointment *per se* but on its validity, there is in our view no need for Tan Sri Shafee to adduce any evidence on that appointment. We thus rule that there is no necessity for Tan Sri Shafee to depose on affidavit the fact of his appointment as a Deputy Public Prosecutor.

[17] Likewise, the reference by the Court of Appeal to statement under s. 112 of the CPC, which had been struck out, has no effect on our decision on the issue of conflict of interest on the part of Tan Sri Shafee. As we have stated earlier on the facts and circumstances of this case, no case had been made out on the issue of conflict of interest.

[18] For the above reasons, we dismiss the appeal and affirm the decision of the Court of Appeal.